Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LA SOCIETE GENERALE IMMOBILIERE AND LSGI, INC.,
Petitioners,

v.

THE MINNEAPOLIS COMMUNITY DEVELOPMENT AGENCY AND THE CITY OF MINNEAPOLIS,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's reasoning in *Griffin* v. *United States*, 502 U.S. 46 (1991), upholding a jury's general verdict even though one of the two grounds for the criminal count was unsupported by sufficient evidence, applies with equal force to general verdicts in civil cases.

2. Whether a jury's general verdict of breach of contract, supported by evidence of various breaches, can be reversed without a remand for retrial if some, but not all, of the factual grounds submitted to the jury lack sufficient evidentiary support.

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

La Societe Generale Immobiliere is a subsidiary of Sertagex. LSGI, Inc. is a subsidiary of La Societe Generale Immobiliere. La Societe Generale Immobiliere has two other subsidiaries, CPH, S.A. and SCC, S.A. All of these companies are privately held.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
DISCLOSURE STATEMENT PURSUANT TO RULE 29.1	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT	2
A. Factual Background	2
B. Proceedings Below	7
REASONS FOR GRANTING THE PETITION	10
CONCLUSION	17

TABLE OF AUTHORITIES

CASES	Page
Astor Chauffeured Limousine Co. v. *Runnfeldt Inv. Corp.*, 910 F.2d 1540 (7th Cir. 1990)	15
City of Columbia v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991)	12
Composite Marine Propellers v. *Van Der Woude*, 962 F.2d 1263 (7th Cir. 1992)	12, 13
Dillard & Sons Constr., Inc. v. *Burnup & Sims Comtec, Inc.*, Nos. 93-7090, 93-7101, 1995 WL 145981 (10th Cir. Apr. 4, 1995)	15
FDIC v. *Holbrook & Johnston*, 632 N.E.2d 424 (Mass. Ct. App.), *review denied*, 638 N.E.2d 913 (Mass. 1994)	13
Griffin v. *United States*, 502 U.S. 46 (1991)	11, 12, 14
Reeves v. *Acromed Corp.*, 44 F.3d 300 (5th Cir. 1995)	15
Spectrum Sports, Inc. v. *McQuillan*, 113 S. Ct. 884 (1993)	12
Sunkist Growers, Inc. v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962)	12
Virtual Maintenance Inc. v. *Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1993)	13
Walther v. *Lone Star Gas Co.*, 952 F.2d 119 (5th Cir.), *reh'g denied by* 977 F.2d 161 (5th Cir. 1992)	12

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PETITION FOR A WRIT OF CERTIORARI

La Societe Generale Immobiliere and LSGI, Inc. (collectively "petitioners" or "LSGI"), hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 44 F.3d 629 and is included in the Appendix at 1a-22a. The order of the court of appeals denying rehearing is not reported and is included in the Appendix at 23a. The post-trial opinion of the district court is reported at 827 F. Supp. 1431 and is included in the Appendix at 24a-36a. The district court order denying the parties'

motions for summary judgment is not reported and is included in the Appendix at 37a-48a.

JURISDICTION

The decision of the court of appeals was entered on December 22, 1994. On February 17, 1995, the court of appeals denied LSGI's petition for rehearing with a suggestion for rehearing en banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

A. Factual Background

Petitioners, one of Europe's most experienced and successful developers and its American subsidiary, spent more than three years and $3.2 million dollars developing what would have been one of the premier, state-of-the-art, shopping malls in the world ("the Project"), anchored by two of America's most prominent retail stores, Nordstrom and Neiman-Marcus. Petitioners undertook these efforts pursuant to a Development Agreement ("the Contract") with respondents, the Minneapolis Community Development Agency ("MCDA") and the City of Minneapolis (collectively, "the City"). The Contract granted petitioners exclusive rights to negotiate the development of the Project. RA.16 at 183.[1] The Project was to be built on the City's main shopping street, Nicollet Mall, in downtown Minneapolis. *Id.* at 180. Petitioners' "Preliminary Plans," approved by the City in early 1986, envisioned that the Project site would be covered by a glass atrium or "dome" and that traffic on Nicollet Mall would be rerouted under the Project through a tunnel. *Id.* at 184.

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[1] References to "RA. ——" refer to the appendices filed by the parties in the Eighth Circuit. References to "RB. ——" refer to the supplemental appendix filed in the Eighth Circuit on petition for rehearing.

Under the Contract, petitioners agreed to deliver within one year (the "contract year"), *inter alia*, "evidence reasonably satisfactory to the MCDA" that they had secured acceptable "anchor tenants." Contract § 3.01(a), RA.17 at 218. The City, in turn, agreed that if petitioners met their obligations it would, *inter alia*, acquire the property on which the proposed Project was to be built and lease it to petitioners for 99 years. *Id.* at 207.

To accommodate both petitioners' need for finality in the design of the mall (for marketing to prospective anchor tenants) and the City's indecisiveness as to certain minor aspects of the design (RB.70-71), the parties negotiated language providing that "prior to the final approval" of LSGI's plans, the City Council retained final design approval over the "treatment" of Nicollet Mall. Contract § 2.02, RA.17 at 216. To obtain "final approval" of its plans, the Contract required LSGI to submit "Proposed Project Plans" no later than 60 days prior to the end of the contract year. *Id.* at 215. The Contract specified that the City could reject the Proposed Plans *only* if they were "not in general conformance with the Preliminary Plans." *Id.* The Contract also stipulated that the Proposed Plans would be deemed approved, and construction could commence, if the MCDA failed to act on them within 15 business days. *Id.* at 216; see also App. at 10a n.2.

From its inception, the Project was opposed by certain politically influential downtown retailers who feared that an enclosed shopping "center" on the Mall would draw customers from their stores. RA.80 at 826-30. These retailers aggressively lobbied the Mayor, and enlisted his support for their cause. To assist these individuals, the Mayor, in addition to vetoing the unanimously approved original version of the Contract, established and hand-picked a Committee on the Future of Nicollet Mall to "advise" the City Council on the development of the Mall. *Id.* at 835-36. One City Council member called it "a set up committee." *Id.* at 838.

Nevertheless, petitioners and the City executed the Contract on November 3, 1986 after the City Council overrode the Mayor's veto. During the course of the contract year, petitioners diligently marketed the Project to prospective anchor tenants with the approved Preliminary Plans. RA.79 at 786. More than 60 days prior to the end of that year, petitioners—as required—submitted their "proposed Project Plans and Specifications" to the City. *Id.* at 792-93; RA.80 at 799-801. These plans, *as required by the Contract*, were in "conformance with" the Preliminary Plans and incorporated the dome-and-tunnel concept. Respondents took no action with respect to these plans during the subsequent 15-day period and thus they were "deemed" to be "approved" as "final" pursuant to the Contract.

By October 1987, petitioners had secured a firm commitment from Nordstrom to be an anchor tenant, as well as an expression of strong interest from Neiman-Marcus. RA.30 at 455. Petitioners also had secured the necessary financing for the Project. RB.27. As a result, the Executive Director of the MCDA recommended that the MCDA close the Contract. RA.83 at 919. Shocked opponents of the Project increased their lobbying efforts (RA.30 at 839; RA.18 at 388) and the Mayor summoned the director for a Sunday meeting to question him about petitioners' performance under the Contract. RA.83 at 919-20. Hours prior to the scheduled Closing on November 3, 1987, the final day of the contract year, the MCDA responded to the last-minute lobbying efforts by adopting the "Cramer Resolution," directing petitioners not to enclose Nicollet Mall and to keep traffic at grade. RA.80 at 830. Nevertheless, the City closed on the Contract, recognizing that petitioners had substantially complied with its terms and had delivered "evidence reasonably satisfactory to [the MCDA]" that it had secured two anchor tenants. RA.17 at 218. Among the documents executed at the Closing was a "Post-Closing Agreement" (RA.18 at 389) in which the parties agreed to

use their best efforts and to cooperate fully in order for petitioners to secure within 30 days "further evidence reasonably satisfactory to the MCDA" of Neiman-Marcus's commitment. RA.19 at 394.

For the next 18 months, the City repeatedly, through many separate and distinct acts, and in bad faith, made it impossible for LSGI to perform under the Contract and Post-Closing Agreement. Two days after the Closing, for example, the Mayor, "upset" that the MCDA had closed on the Contract, publicly denounced petitioners. RA.80 at 831-32; RA.82 at 905-06. As reported in the *Skyway News*, a local paper, he claimed that petitioners had misled the two anchor stores and stated that developers were untrustworthy. RA.53. He also sent a letter to Nordstrom in which he indicated that petitioners had deceived that company by failing to keep it fully informed. RA.36 at 541-42. The Mayor sent a similar letter to Neiman-Marcus. RA.37 at 545.

Despite these actions, on December 7, 1987, petitioners in an effort to comply with the Cramer Resolution, presented new plans to the City which abandoned the idea of an atrium and which kept traffic on Nicollet Mall at grade. RB.39 at 64. The City Council requested that petitioners produce a model of the new project ("Project 2") (RB.40 at 184), and resolved to allow petitioners more time to present this design. RB.41 at 68. The Mayor vetoed this action, but the Council overrode his veto. RB.42 at 71. Nonetheless, on January 20, 1988, the MCDA sent petitioners a surprise Notice of Default (RB.44 at 205), which was leaked to the press, further damaging petitioners' reputations and drastically complicating LSGI's efforts to secure a final commitment from Neiman-Marcus. RB.45 at 74, 78. The MCDA, however, encouraged petitioners to continue to invest in the Project by stating that the Notice of Default was nothing more than "contract maintenance." RB.46 at 73.

During the winter of 1988, petitioners continued in good faith to try to make Project 2 a reality. RB.48 at

183-85. They presented their new design model to Nordstrom and Neiman-Marcus, which continued to express interest despite misgivings about the City's political climate. RB.49 at 76. Respondents, however, finally destroyed any chance petitioners had of securing Neiman-Marcus's commitment to Project 2 by giving petitioners' competitor, Bell Canada Development, a $15 million subsidy to lure Neiman-Marcus to a competing site within the City. RB.50 at 81-83.

Petitioners and their architect, however, still hopeful of proceeding with Project 2 and of finding another anchor tenant, and relying on the City's good faith, presented their model for Project 2 to the City Council in March 1989. RB.51 at 185. This design was well received and the City Council resolved that petitioners should proceed. *Id.* The Council, however, gave petitioners only 30 additional days in which to secure two anchor tenants. RB.53.

Two weeks later, the City approved petitioners' design for Project 2, but the Mayor vetoed it, suggesting that the design was bad and questioning whether Minneapolis could support a project of this size. RB.56 at 94. On April 8, 1988, the City Council overrode the Mayor's veto. RB.57 at 95. On the same day, petitioners received one letter from the MCDA congratulating them on the approval of their new plans, and another letter from the MCDA stating that if petitioners wanted the Project to survive they would, again, need to redesign it. RB.58 at 96-100.

The City Council suspended the Post-Closing Agreement until August 1988 and pressured petitioners to reduce the scope of the Project yet again. RB.59 at 104. Between May and June, petitioners designed yet another project ("Project 3"), which excluded certain property known as the "614 Property." RB.60. On July 13, 1988, the City Council passed a resolution approving Project 3 and its financing. RB.61. Following the exe-

cution of a new development agreement, petitioners were to be given 10 months to secure one or more anchor tenants for Project 3. RB.62 at 114. Instead of closing on the promised development agreement, however, the City advised petitioners that they were in default and unilaterally terminated the Contract and Post-Closing Agreement in June 1989. RB.63.

B. Proceedings Below

1. In 1989, petitioners sued the City in the United States District Court for the District of Minnesota for breach of contract and deprivation of property without due process. Petitioners pointed to the Cramer Resolution as the first of many violations of the Contract. Petitioners *also* argued that the City violated its contractual obligations of good faith and fair dealing by engaging in a whole series of bad faith acts between the time of the Cramer Resolution and the time the Contract was terminated, in June 1989. RB.50, 58-59, 79. The district court, Judge Devitt presiding, denied the City's motion for summary judgment (App. at 37a-48a), finding that the Contract did not unambiguously grant the MCDA the right to adopt the Cramer Resolution and that other material questions of fact also existed as to petitioners' other claims of breach of the implied covenant of good faith and fair dealing. After a three-week trial before Judge Rosenbaum, the case was submitted to the jury on the theory that the City's *overall* course of conduct, including its violations of its obligation of good faith and fair dealing, constituted a breach of contract.[2]

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[2] Instruction No. 22 stated that "LSGI argues that it was prevented by the defendant from fully and completely performing the contract. . . . If you find that either party has unreasonably interfered with the contract, this would be a breach of the contract." RA.88. Instruction No. 17 stated that:

> The law implies in every contract a promise to act in good faith. In other words, any contract between the parties included an implied term imposing a duty of good faith and

The jury, on the basis of a verdict form which the City approved, returned a general verdict finding that the MCDA had breached the Contract. The jury awarded petitioners approximately $25 million in damages for lost profits and out-of-pocket expenses.[3] RB.1. The jury also found that in connection with its breach the City arbitrarily injured petitioners' reputation within the very small community of retailers with whom they worked and awarded petitioners approximately $9 million for that denial of due process in connection with the destruction of their contractual right protected under state law. *Id.* Both at trial,[4] and on post-trial motions,[5] Judge Rosen-

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fair dealing on the parties in the performance and enforcement of the contract.

RA.87.

[3] The jury's outrage at their own City's acts is manifest from respondents' post-trial pleadings which included a *Star Tribune* report from February 26, 1993: "For the federal jury that deliberated the case of [LSGI] the verdict was clear almost right from the start: The City screwed up. The jury . . . quickly concluded that the City broke its contract with the French development firm by not acting in good faith and by interfering with LSGI's attempts to respond to the City's shifting demands, according to three jurors . . . . Some jurors were disturbed by Mayor Don Fraser's political maneuvering and the heavy-handed lobbying . . . . [Others] thought the City Council was most to blame, telling LSGI one thing and then changing terms at the last minute. A couple of jurors at first wanted to award the full $67 million in damages [LSGI] wanted . . . . 'We felt there was overwhelming evidence that the City was at fault . . . . LSGI did everything the City asked, and the City still pulled the rug out from under them.'" RB.65.

[4] "Counsel, I will short circuit this one. That contract and that language is ambiguous. . . . [I]f it was plain and unambiguous, the mayor would not have felt so deeply committed to putting in further explanation." RB.3 at 73.

[5] "It is not at all clear to the Court that, on the 365th day of a one-year contract, the [City] could simply reject an approved design plan. Certainly a clause of this type could reserve finish or treatment details. But the overall design plan had been ap-

baum reaffirmed that the Contract was "patent[ly]" ambiguous. RA.4 at 5. The district court held that the damages awarded by the jury were supported by the evidence and that LSGI's reputation had suffered serious harm and it refused to disturb the jury's factual findings. *Id.* at 5, 9. Expressing concern, however, that the burden of the judgment would fall on the City's taxpayers rather than "on the official wrongdoers," the district court directed a remittitur of the jury award to $17.2 million. *Id.* at 13.[6]

2. Both the City and petitioners appealed. The Eighth Circuit did not address any issues raised on appeal except those dealing with or flowing from the question of breach of contract. Even then, the court of appeals narrowly focused on the events of November 1987, and almost exclusively on the question of whether the City had the contractual right to alter the Project's fundamental design by means of the Cramer Resolution. In direct conflict with the holdings of two respected district court judges and the verdict of the jury, the court of appeals held that the Contract *unambiguously* granted the City the right to adopt the Cramer Resolution. It did so despite the obvious inconsistency between the contractual language specifying that the final plans could be rejected *only* if they were *not* in "conformance with" the preliminary plans (which incorporated the dome-and-tunnel concept) and the City's claimed right to reject final plans

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proved and a concept drawing was part of the approved documents. The [City] knew that the dome and tunnel plan . . . was an integral part of the presentation being made to prospective anchor tenants. This design plan was appended to the development contract. The Court found, and maintains that it is not clear from the plain language what the parties intended in their use of the term 'final design [approval of the Project's] treatment.'" RB.4 at 4.

[6] Judge Rosenbaum also held that the jury's out-of-pocket expenses award was subsumed by the award of lost profits.

incorporating precisely that design concept.[7] The court of appeals also held that the City had not breached the Contract by sending harmful letters to potential anchor tenants or by attempting to terminate the Contract during a period of "Unavoidable Delay."

Based on this limited analysis, the court of appeals overturned the jury's verdict in its entirety. The court rationalized the City's actions during November 1987 with respect to Project 1 and then found that those actions did not constitute breaches of the Contract. The court, however, totally ignored the substantial evidence petitioners presented to the jury of the City's numerous *other* bad faith breaches in the months following November 1987 with respect to Projects 2 and 3, evidence which separately supported the jury's general verdict of breach. In so doing, and in reversing rather than affirming or, at a minimum, remanding for a new trial, the court of appeals manifestly disregarded the norms of federal civil procedure in jury trials.

REASONS FOR GRANTING THE PETITION

The court of appeals' outrageous holding that the Contract was unambiguous—despite two independent rulings by district court judges to the contrary—was flatly wrong and unjustly deprived petitioners of any remedy for harm done by respondents. Far more importantly for this Court's purposes, however, the decision of the Eighth Circuit raises a significant and recurring question

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[7] The court of appeals focused on the "District Court's mistake" in its post-trial opinion in construing the words of the Contract. However, the grammatical error in Judge Rosenbaum's post-trial opinion and his citation to the wrong trial exhibit *were caused by the City*. The City, in its Brief in Support of its Motion for Judgment Notwithstanding the Verdict, misquoted the language of Section 2.02 and provided the district court with the inaccurate citation. The court of appeals, apparently recognizing the irrelevancy of the misquotation, summarily concluded that the word "treatment" "must" include the "approval of the dome and tunnel concept." App. at 13a.

with respect to federal civil procedure and the proper respect for the role of the jury in federal civil trials, *viz.*, whether it is proper for a court of appeals to *reverse* a general verdict upon holding that *some* factual basis upon which the jury could have relied was deficient. The fact that the court of appeals' opinion itself does not highlight this issue—*i.e.*, it does not address the evidence of subsequent breaches presented to the jury by petitioners, or explain why it is unnecessary to do so—is hardly surprising. The court mistakenly assumed, at the invitation of respondents (Appellants' Reply Br. at 4), that it could overturn the jury's general verdict if only one of the grounds for breach was factually insufficient. This error in the evaluation of general verdicts will appear most often in precisely this manner—as an implicit, but no less controlling, holding.

The decision of the court of appeals not to consider the independent grounds supporting the jury's general verdict of breach conflicts with decisions in the Fifth and Seventh Circuits that have expressly applied this Court's decision in *Griffin* v. *United States*, 502 U.S. 46 (1991), to civil actions. *Griffin* held that general verdicts in criminal cases were to be *affirmed* even if one possible ground for the verdict was unsupported by sufficient evidence. *Id.* Moreover, the decision of the court of appeals conflicts with the decisions of the Fifth, Seventh, and Tenth Circuits requiring, at a minimum, a remand for a new trial whenever an issue is erroneously submitted to a jury that returns a general verdict. Thus, this case presents the Court with a perfect vehicle for resolving fundamental conflicts among the circuits with respect to the proper method of appellate review of general verdicts.

1. In *Griffin* v. *United States*, 502 U.S. 46 (1991), the United States charged the defendant with one count of conspiracy. The jury returned a general verdict against the defendant. The defendant attacked the general verdict because one of the two alleged objects of the conspiracy had not been supported by sufficient evidence. Nonetheless, this Court upheld the conviction:

> It was settled law in England before the Declaration of Independence, and in this country long afterwards, that a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds—even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action.

Id. at 49. So long as one of the bases for a general verdict has sufficient evidentiary support and the jury has not been given a legally erroneous instruction, the general verdict must be affirmed.[8]

Both the Fifth and Seventh Circuits have applied *Griffin* to civil cases. In *Walther* v. *Lone Star Gas Co.*, 952 F.2d 119 (5th Cir.), *reh'g denied by* 977 F.2d 161 (5th Cir. 1992), the court upheld a jury verdict of age discrimination even though one of the grounds submitted by the plaintiff was not factually supported. The Fifth Circuit, noting this Court's decision in *Griffin*, concluded that it would not reverse the general verdict "simply because the jury might have decided on a ground that was supported by insufficient evidence. Instead we must assume that the jury considered all of the evidence in reaching its decision." *Id.* at 126.

Likewise in *Composite Marine Propellers* v. *Van Der Woude*, 962 F.2d 1263 (7th Cir. 1992) (per curiam), the Seventh Circuit, relying on *Griffin*, refused to overturn the jury's general verdict on misappropriation of trade secrets unless none of the eight possible trade

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[8] *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962), is not to the contrary. *Sunkist* involved a general verdict reached by a jury that had received a legally erroneous instruction that a subsidiary could conspire with its corporate parent. *Id.* All of this Court's decisions applying *Sunkist* have involved juries given legally erroneous instructions. *See Spectrum Sports, Inc.* v. *McQuillan*, 113 S. Ct. 884, 892 (1993); *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 384 (1991). The present case does not turn on a legally erroneous instruction.

secrets had been misappropriated. *Id.* at 1265. "The jury returned a general verdict, so if the evidence supports any of them, the verdict must be sustained." *Id.*[9]

In the present case, however, the Eighth Circuit ignored *Griffin*[10] and overturned the jury's general verdict even though it failed to consider the substantial evidence demonstrating that the City had breached the Contract repeatedly *after* November 1987. At the close of oral argument it became apparent that the court of appeals, with the City's endorsement during rebuttal, was contemplating reversing the general verdict solely on the basis of a finding that the City's November 1987 actions did not breach the Contract. Petitioners immediately attempted to file a Post-Argument Memorandum reminding the court that the general verdict could not be reversed on that basis alone because of the numerous subsequent breaches committed by the City.[11] The Eighth Circuit, however, refused the memorandum and proceeded to overturn the jury's general verdict without considering all of the factual grounds for breach.

The Eighth Circuit erred in not following *Griffin* because *Griffin* applies at least with equal force to general verdicts reached in civil cases. It is uniquely the province of the jury, whether in criminal or civil trials, to weigh the evidence and to determine what facts have been proved. This Court in *Griffin* found no reason not to

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[9] *See also FDIC* v. *Holbrook & Johnston*, 632 N.E.2d 424, 427-28 & n.12 (Mass. Ct. App.), *review denied*, 638 N.E.2d 913 (Mass. 1994) (state case upholding civil general verdict as long as any one of four factual characterizations was supported by sufficient evidence, noting that the circumstances in *Griffin* were "far less attractive analytically").

[10] The Sixth Circuit likewise has reused to apply *Griffin*'s holding to general verdicts in civil cases, claiming that *Griffin* "does not alter the longstanding civil general verdict rule . . . to which this circuit has consistently adhered." *Virtual Maintenance Inc.* v. *Prime Computer, Inc.*, 11 F.3d 660, 667 (6th Cir. 1993).

[11] *See* App. at 49a-52a.

rely on the jury's factfinding ability when it was presented with inadequate factual bases for a verdict:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law . . . . When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence.

502 U.S. at 59. Jurors are no *less* capable of analyzing the evidence presented to them in civil cases. In civil cases the intelligence and expertise of the jury should also assure the court that the jury has not relied on factually inadequate grounds to reach its general verdict. Unless a *constitutionally or legally* inadequate instruction is submitted to the jury, a civil general verdict supported by at least one factual ground should be upheld.

This result, unlike the decision reached by the Eighth Circuit, produces no hardship on the party facing a general verdict. If the party wishes to know with certainty the precise grounds on which a jury's verdict is based, Federal Rule of Civil Procedure 49 permits the party to seek special verdicts or interrogatories. Here, the City did not do so and accepted the verdict form. A party should not be permitted to void the jury's considerable factfinding efforts simply by showing that some of the numerous grounds presented to it were factually inadequate to support the general verdict. The split of authority among the circuits with respect to *Griffin* and the treatment of general verdicts in federal civil cases threatens the finality and repose of jury verdicts supported by sufficient evidence and therefore the decision of the court below merits this Court's review.

2. The Eighth Circuit's decision to reverse outright the general verdict also conflicts with the decisions of sev-

eral courts of appeals holding that general verdicts possibly based on improper grounds, whether legal or factual, at a minimum should be remanded for retrial. In *Dillard & Sons Construction, Inc.* v. *Burnup & Sims Comtec, Inc.*, Nos. 93-7090, 93-7101, 1995 WL 145981 (10th Cir. Apr. 4, 1995), the Tenth Circuit held that the district court had erroneously submitted a question of law to the jury and had *remanded* the case for a new trial. *Id.* at *5. The court of appeals followed the circuit's general rule that "a general verdict cannot stand" when an issue is submitted to the jury in error. *Id.* The court could not determine for itself what effect the erroneous submission had on the jury's deliberations and whether, absent that submission, the jury would have returned the same general verdict. *Id.* Therefore, the court concluded a new trial was necessary. Likewise, in *Reeves* v. *Acromed Corp.*, 44 F.3d 300 (5th Cir. 1995), the Fifth Circuit held that one of the four theories of recovery submitted to the jury by the district court was preempted by federal law. *Id.* at 307. The court remanded the case for *retrial* because there was sufficient evidence under one of the other theories of recovery to support the submission of the issue to the jury. *Id.* at 308.[12] Under *Griffin*, of course, the unnecessary exercise, and expense, of a new trial—where the jury's verdict is supported by the evidence—would be avoided by *affirming* the general verdict.

In the instant case, the Eighth Circuit, in direct conflict with the decisions of three other courts of appeals, made no determination about the other evidence supporting the jury's general verdict of breach. The court instead simply overturned the jury's verdict and dismissed the case. Thus, even if the jury could not have found the

[12] Likewise, in *Astor Chauffeured Limousine Co.* v. *Runnfeldt Investment Corp.*, 910 F.2d 1540 (7th Cir. 1990), the Seventh Circuit overturned a general verdict and held that a new trial was necessary because the district court had submitted a factual theory of liability to the jury that was inconsistent with its position in a previous suit. *Id.* at 1548-49.

City liable for breach on the basis of the Cramer Resolution or any of respondents' other acts in November 1987, the court of appeals thwarted the jury's factfinding role by ignoring the evidence presented to it of the City's actions over the following 18 months. Even if *Griffin* does not apply to civil cases, the Eighth Circuit's refusal at least to remand the case for a new trial is contrary to the decisions of the other courts of appeals to reach this issue.

Allowing the Eighth Circuit's decision to stand will place plaintiffs in federal jury trials under an inordinate and unreasonable burden to limit their presentation of facts before the jury for fear of providing defendants with *one* insufficient ground that will allow the jury's verdict to be overturned. This perverse rule will also encourage defendants to appeal every general verdict. If the defendant can demonstrate that any one of the several grounds presented to the jury by the plaintiff was factually insufficient, the entire verdict will fall and the plaintiff will not be allowed to retry the case, even though all other grounds presented to the jury may have been supported by sufficient evidence, and indeed, relied upon by the jury in reaching its general verdict.

Accordingly, the decision of the court below raises two separate conflicts in decisions among the courts of appeals with respect to the proper treatment of general verdicts in federal civil trials. The Eighth Circuit's decision not to affirm the jury's general verdict is in conflict with this Court's decision in *Griffin* and those courts of appeals that have adopted *Griffin* in the civil context. The Eighth Circuit's decision not to remand the case for retrial also is in conflict with the decisions of those courts of appeals that have reached the issue. Moreover, further confusion in the federal court system exists because these two lines of cases seemingly conflict with each other, at least in instances when theories that are not in conflict with the law, but are nonetheless insufficiently supported by the facts, are submitted to a jury that

reaches a general verdict. Under *Griffin* the reviewing court should affirm the general verdict. Under the other line of cases, however, the court is to remand the case for a new trial. In no event, however, is a court justified in merely overturning a general verdict as the Eighth Circuit has done in this case. The decision of the court below presents the Court with an opportunity to settle definitively this issue of pivotal importance for all federal civil jury cases ultimately decided on the basis of a general verdict.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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